IN THE

Supreme Court of the United States

October Term—1948

No. 673

ANTHONY SCOCOZZA, an infant, by ERMINO SCOCOZZA, his guardian *ad litem*, and ERMINO SCOCOZZA,

Petitioners,

—against—

ERIE RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The oral opinion of the District Court is printed in the Transcript of Record (190). The opinion of the Court of Appeals (231-233) is reported in 171 F. (2d) 745.

Jurisdiction

This Court's jurisdiction is invoked under Section 1254 (sub. 1) of Title 28, United States Code.

Question Presented

(1) The one question presented here is whether there is any evidence in this record upon which a jury could find negligence on the part of the respondent which contributed, in whole or in part, to the injuries sustained by the petitioner.

(2) The petitioner seeks to present a second question for review by this Court (Pet. p. 7) as to "Whether the Court of Appeals was right in formulating its rule regarding the quantum of proof required to make out a *prima facie* case of negligence in an action under the Federal Employers' Liability Act." He asserts (Pet. p. 8) that the Court of Appeals devised a new rule of independently resolving the credibility of petitioner's testimony in its unanimous affirmance of the judgment below. A reading of the opinion of the Court of Appeals will show the lack of merit in this contention. The Court of Appeals followed the law as laid down by this Court, citing such cases as *Lavender* v. *Kurn*, 327 U. S. 645; *Myers* v. *Reading Company*, 331 U. S. 477; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, and *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329. Its decision was based upon an appraisal of the evidence in the light most favorable to the petitioner. However, it found no evidence of negligence on the part of respondent that would support a verdict for the petitioner, " * * nothing whatever in this record to show that it [respondent] did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode."

Accordingly, the petitioner errs in contending in this Court (Br. p. 25) that "the Court of Appeals held that a plaintiff does not make out a *prima facie* case unless he proves his cause of action by a preponderance of the evidence."

Nature of the Case

The action was brought under the Federal Employers' Liability Act (45 U. S. C. §51 *et seq.*) to recover damages for personal injuries sustained by the infant petitioner (hereinafter called "the petitioner") on October 21, 1943 while employed as a machinist-helper in defendant's railroad yards at Jersey City. His father sued for medical expenses and loss of services.

Suit was not commenced until October 17. 1946, three years after the accident and four days before it would have been barred by limitations (45 U. S. C. §56).

Upon the trial petitioner claimed that, while hammering a bolt on the rear lefthand side of a locomotive, pursuant to orders from the mechanic whom he assisted, an explosion occurred which caused metallic fragments to enter and destroy the sight of his left eye. However, it was established by wholly uncontroverted evidence that the metallic fragments in question could not have come from the locomotive.

Petitioner's claim was furthermore in complete conflict with the documentary evidence and undisputed physical facts which established that the accident *could not* have happened as claimed by petitioner. The uncontroverted physical evidence in the case was consistent only with the conclusion that the injuries resulted from the explosion of a small arms cartridge or bullet which petitioner was striking with a hammer and chisel on the breast-beam on the front end of the locomotive.

The Trial Court (Waring, J.) granted respondent's motion for a directed verdict upon the ground that there was "not a shred of testimony" to establish any negligence on the part of respondent (190).

The Court of Appeals for the Second Circuit (L. Hand, Chase and Frank) in a unanimous opinion written by Judge Chase, affirmed the judgment below on the ground that viewing the evidence in the light most favorable to the petitioner, a case of actionable negligence had not been made out, since "there is nothing whatever in this record to show that it [respondent] did, or should, have had even the slightest intimation that hitting the nuts on this engine would cause anything to explode" (233).

The Evidence

Petitioner's Testimony

The sole witness called by petitioner was the petitioner himself, who was 17 years of age at the time of the accident and over 21 at the time of the trial. His direct testimony covers only 9 pages of the record and his cross examination covers 30 pages.

He was first employed by respondent on February 1, 1943 and had been working as a machinist-helper for a period of several months prior to the occurrence of the accident on October 21, 1943 (13, 14). His signed application for employment with respondent failed to disclose any prior employment (Deft. Ex. A, 194), and upon direct examination he likewise asserted that his first employment was with respondent (13). Upon cross examination he likewise denied any prior employment at first (21) but, when pressed, admitted that he had previously worked for the DeLuxe Theatre on Tremont Avenue in the Bronx "for a few months" (22) although denying that, three months after the accident, he went back to the theatre with a man named Weiss and stole $452.70 from the safe (50). He was also unable to remember ever having worked for Jack Mandel's grocery store in the Bronx (23) even

when confronted with his own prior statement to that effect made on October 27, 1943 (48-49, Deft. Ex. O, 213).

He testified that on the morning of the accident he was working in respondent's Jersey City yards as assistant to Eugene Gigli, a machinist (14). Locomotive 2527 was standing on the track outside the roundhouse (14, 15). This locomotive, he claimed, had been brought in about 9:30 A.M., had steam up, a fire going, smoke coming out the top and "was to go right out again" (15, 48). Upon cross examination, he first admitted that there were canvas and boards on the locomotive but immediately afterwards denied that the cab was covered with canvas and boarded up (48). Despite his insistence that the locomotive had just come in for repairs and was to go right out again, he admitted that it was without engineer, without fireman and without crew (15, 48).

He testified that Gigli told him to start checking *the middle part of the locomotive on the left side* "to see if there are any nuts or bolts loose" (39) and then "went inside the roundhouse to sharpen the chisel" (15). He asserted that the first nut or bolt he checked was loose (32). He claimed that an explosion occurred while he was trying to remove the loose nut by hitting it with a hammer and chisel (16):

> "Q. How did you go about it? A. I went over and got a chisel and I hit it once or twice, and the third time something went off and I didn't know what hit me.
>
> Q. Tell us, do you know whether it was the chisel that went off? A. I don't know what it was.
>
> Q. Was it the bolt that shattered? A. I don't know.
>
> Q. Do you know what it was? A. No.
>
> Q. What was the next thing that you knew? A. I was on the floor unconscious for a few minutes."

After the accident he was taken into the roundhouse where first aid was administered by Dr. Moriarty (17). He was then brought to St. Francis Hospital where his eye was removed the following day, October 22, and where he remained about 10 or 11 days (17, 69, 135).

Petitioner marked on a photograph of the locomotive the location of the bolt which he claimed to have been hammering at the time of the explosion (30-31; Deft. Ex. C, 198). Immediately above the lower arrow and to the right of the third large wheel, the Court will note a small circle which petitioner drew on the photograph to identify the spot. He insisted that no one else was near the scene either at or immediately before the time of the accident and specifically denied the presence of a fellow employee named Gallo (41-43).

Petitioner's Prior Contradictory Version of the Accident

On October 27, 1943, six days after the accident, petitioner was questioned in St. Francis Hospital by Frank A. O'Hare, of respondent's claim department, with respect to the circumstances of the accident (118-119) and the statement made by petitioner at that time was taken down stenographically by a court stenographer, Louis Kabot (93, Deft. Ex. O, 210). It flatly contradicts his testimony upon the trial five years later in three significant respects:

1. *The place of the accident.* Whereas petitioner claimed at the trial that the explosion occurred at the point which he marked with a circle on the photograph of the locomotive (Deft. Ex. C, 198), *he admitted in 1943 that it occurred while he was hammering on the front of the engine* (Deft. Ex. O, 212). A photograph of the front of the locomotive appears in the record as Defendant's Exhibit D (200).

2. *Petitioner's activity at the time.* Whereas petitioner claimed upon the trial that at the time of the explosion he was engaged, pursuant to orders from his supervisor Gigli, in trying to remove a loose nut and bolt from the locomotive at the point circled on Defendant's Exhibit C, *he stated in 1943 that he was engaged in hammering a "nut" on the front end of the engine, "just to smooth it out", because "they come in handy" and that he had not been instructed to do so by anyone* (Deft. Ex. O, 212-213):

"Q. As I get the story, you were hammering, with a chisel and hammer, on the front of the engine, and explosion happened, and you don't know anything at all as to what caused it to happen? A. No.

* * * * *

Q. Why were you hammering on the nut at the time? A. Just to smooth it out.

Q. Just to smooth it out? A. Yes.

Q. You were not told to do that were you? A. No.

* * * * *

Q. The machinist that you were supposed to work with, what is his name? A. His name is Gigli.

Q. He wasn't around at the time the accident happened? A. No.

* * * * *

Q. You were waiting to be told to go to work on another engine? A. I don't know if we were working on another engine or not.

Q. You were just smoothing out a nut? A. Yes, because they come in handy."

3. *The presence of an eye-witness.* Whereas petitioner denied upon the trial that his fellow-employee, Gallo, had been present at or immediately before the time of the accident, *he admitted in 1943 that he had been speaking to Gallo immediately prior to the accident* (Deft. Ex. O, 212).

When confronted with these prior statements completely contradicting his testimony upon the trial, petitioner professed complete inability to remember ever having seen Mr. O'Hare or ever having made the statements referred to (40, 43, 49). In an attempt to minimize the significance of these statements, petitioner's brief before this Court states that "the hospital record contained an order prescribing morphine for plaintiff on October 27, 1943, the day of the interview" (Br. p. 15). This statement is unwarranted. Dr. Connolly, the eye specialist on the staff of St. Francis Hospital, who removed plaintiff's eye at the hospital on October 22, 1943, specifically testified that the order in question was in his own handwriting (135) and that that date opposite the order, also in his own handwriting, was October 22 and not October 27, as suggested by petitioner's trial counsel (136).

Respondent's Evidence

1. The documentary evidence.

Whereas in an attempt to establish a plausible foundation for his version of the explosion, petitioner asserted upon the trial that the locomotive had just come off the line, had a fire in the boiler and steam up, respondent produced *documentary proof that the locomotive had been placed in dead storage on October 9, 1943, twelve days before the accident, and had remained continuously in storage for over a year until October 11, 1944.*

This documentary proof consisted of the Monthly Locomotive Inspection and Repair Reports which respondent was required by law to file with the Interstate Commerce Commission (104-5, Deft. Exs. R and S, 214-16; Federal Boiler Inspection Act, 45 U. S. C. §29). The September 1943 Report, the last report before the locomotive was placed in storage, showed that it was completely inspected on September 15, 1943, and found to be in good operating condition (106, Deft. Ex. S, 216). The October 1943 Report bears the following legend endorsed across its face (First page of Deft. Ex. R, 214):

> "OUT OF SERVICE AT *Jersey City* FROM 10/9/43
> ACCOUNT OF *Stored*
> AND WILL NOT BE USED UNTIL INSPECTION
> IS MADE AND REPORT FILED
> DATED 10/31/1943 AT J. C."

The Reports for the months of November 1943 to September 1944 bear endorsements identical (except as to date) with the October 1943 endorsement. The October 1944 Report shows that the locomotive was not taken out of storage until October 11, 1944 (last page of Deft. Ex. R, 214).

The Reports in question were identified by Jeremiah Driscoll, master mechanic of respondent's yards in Jersey City under whose general supervision both Gigli and the petitioner worked (104-6). Driscoll testified that, as indicated by these Reports, the locomotive was in storage from October 9, 1943 to October 11, 1944 (105) and explained that no one was permitted to work on an engine once it was placed in storage (106-7). He described the condition of the locomotive as follows (104):

"Q. Where was that locomotive located at the time of the accident? A. Why, right outside the east end of the roundhouse, which we call the No. 1 track. That is used for storing locomotives when we have too many of them in service.

Q. Was this particular locomotive in storage on that day? A. She was.

Q. Will you please tell this Court and jury whether there is any canvas or boarding on the cab because of its being stored? A. Yes, it is the standard practice when we store locomotives to close all windows, close the ventilator on the roof, draw the curtains in the back of the cab and board them up, to keep the employees from getting in the cab of the locomotives and taking parts from them.

Q. And that locomotive, on that day at that particular time, did you have any fire in it? A. No sir, absolutely no fire.

Q. Any steam up? A. No steam.

Q. Was it hot? A. No, it had been laying there since the 9th of October, when we put her in storage."

Gigli testified to the same effect (56).

2. The uncontroverted physical evidence.

In addition to the documentary evidence, respondent produced physical evidence establishing the fact that petitioner's injuries did not and could not have resulted from an explosion of the locomotive, as claimed by petitioner upon the trial. This physical evidence consisted of the metallic fragments which had been removed from petitioner's eye and left hand (Deft. Exs. J, K and L, 208). *The uncontroverted testimony showed that the metallic fragments were composed of gilding metal, the primary*

use of which is to make bullet jackets, and that no such metal was used on the locomotive in question.

The uncontroverted testimony of Gerald J. Horwitz, chemical and metallurgical engineer and technical director of the New York Testing Laboratories, which made an analysis and report on the fragments, revealed that they were composed of gilding metal, with a content of approximately 95% copper and 5% zinc (146, Deft. Ex. W, 221). The principal use of gilding metal—aside from cheap jewelry—is to make bullet jackets, the copper colored pointed portion at the top of the shell that encloses the lead core of the projectile (149-50). Gilding metal bullet jackets, of which he analyzed thousands during the war, usually have a content of approximately 95% copper and 5% zinc, *identical with the fragments removed from plaintiff's eye and hand* (154-55; 144). If a small arms cartridge were placed on a locomotive and struck with a hammer and chisel it would explode (157-58). If the gilding metal bullet jacket hit and dented the end of a locomotive tank, it would disintegrate and fragmentize (169).

The uncontroverted testimony of Driscoll, master mechanic in charge of the roundhouse, revealed that no copper, brass or bronze of any kind was used in the locomotive anywhere near the point at which petitioner claimed to have been injured (109, 117) and that there was no indication or evidence whatever of an "explosion", either at that point or on any other part of the locomotive (108-109).

3. The testimony regarding the circumstances of the accident.

Eugene Gigli, machinist, testified that on the morning of the accident the locomotive in question—No. 2527—was standing on the storage track, without fire or steam and

with canvas and boarding in the cab to keep people out, as was customary with locomotives in storage (55-56). Neither he, petitioner, nor anyone else did any work whatever on this stored locomotive either on the day of the accident or at any time during the year it was in storage (56, 59-60). Shortly before the accident Gigli left his tools on the breast-beam at the front end of the stored locomotive and went to the blacksmith's shop to have a wrench repaired, after asking petitioner to watch the tools and to tell the foreman where he had gone (54-55).

About ten minutes later, Gigli learned of the accident and, with the general foreman, went back to the locomotive to see what had happened (57-58). He found his hammer and chisel on the ground by the breast-beam of the locomotive and the other tools still on the breast-beam (56-57) and saw small copper particles all over *the front of the engine by the breast-beam and on his tools* (58). There was a small dent in the tank of the coal tender of another locomotive stored on the track immediately in front of the locomotive in question. Gigli and the general foreman found and removed similar copper particles from this dent (58). Gigli testified as follows to a conversation with petitioner about a month after the accident (58-59):

> "Q. Mr. Gigli, after the accident did Mr. Scocozza at any time ever tell you what he was doing when the explosion occurred? A. Well, a month after he came through the roundhouse and I was working there and I seen him, and I said Hello to him, and I asked him just what happened the day of the accident. He said that he was playing with two inch and a quarter nuts and he said all of a sudden they exploded."

Florentino Gallo, a machinist-helper like petitioner—who, according to petitioner's 1943 version of the accident,

had been speaking to petitioner just before the event—testified as an eye-witness to the accident. He had just come up to where petitioner was standing *at the front end of the engine* and asked petitioner with whom he was working that day (88). The accident occurred as Gallo was standing one or two feet away (89):

> "Q. Now tell us in your own words, as loudly as you can, Mr. Gallo, what happened? A. In the meantime, when I was asking, there was a hammer—
>
> Q. A hammer? A. He was hammering the front of the engine with something. There was something there that looked like a little fuse, something what they put in the lead box, you know, a fuse.
>
> Q. How big was it? A. It was like about that long, like this, see (indicating), and in the meantime when he was hammering it went off, and a blue flame went right front to his face and when it cleared up, and all the blood came out, like down his face, and then the wrist. He said, 'Look what I got', and he put his hand up and the blood ran in the face.
>
> Q. How far do you say you were from him at that time? A. One or two feet away.
>
> Q. That was at the front of this locomotive? A. On the front of the engine.
>
> Q. Did you see anything around the front of the locomotive after the explosion? A. Well, after the explosion, I saw a lot of little pieces like copper, bronze, things like that; you know it was like copper, you know, when the general foreman came back there, and he picked up all them little pieces."

Jeremiah Driscoll, the master mechanic, heard of the accident about a half hour after it occurred and went to the scene to investigate (107). He testified (108):

"I naturally walked around to see if I could find anything that might cause it. They told me there was an explosion there, and I walked around to see if I could find some empty shells, torpedoes or what have you. I looked around, and I think perhaps I would, and I did see them, and they were all very fine fragments of what might be copper, brass, but I did not know what it was.

Q. *Where were they?* A. *Laying right down between the two engines, between the tank of one and the pilot of the other.*

Q. *That would be the front of engine 2527?* A. *That is right, yes.*"

He also observed a dent in the tank of locomotive 2552 which was stored on the same track immediately ahead of locomotive 2527 (107):

"And then on the one up ahead, which is 2552, there was a hole punched in, a dent, which was 1/8th of an inch in the tank, which is as hard as steel itself, and it showed when some object hit that. I don't know what it might have been and there was a dent in that tank that was not originally there.

Q. That was the rear end of the locomotive, immediately in front of the one— A. That is right.

Q. —which Scocozza claims he was working on? A. That is right."

Except for the fine fragments of copper or brass on the ground between the two locomotives, there was no indication or evidence whatever of an "explosion"—either at the point marked by petitioner on the photograph where, upon the trial he claimed the accident occurred (30-31,

Deft. Ex. C, 198), or at any other point on the locomotive (108-109):

"Q. The testimony here, Mr. Driscoll, by the plaintiff, has been that the nut or bolt which he was working on at or near the point of explosion was located where the two arrows are pointing. Did you look at that portion of the locomotive, and, if so, what did you see? A. That portion was not disturbed at all. It was fully intact. There was no occasion for anybody to work on it. In fact, they were prohibited from working on it. That is up on the front end.

Q. Did you look for and did you find any indication of an explosion in that locomotive? A. No, I did not, other than these fragments that I seen around, and I could not determine in my mind just what it was, because it was just a few particles laying around there shining in the black ground. It was so small that you could not pick them up, but they had already taken up all the pieces that they could."

ARGUMENT

POINT I

The Trial Court properly directed a verdict for respondent on the first cause of action. The evidence, when viewed most favorably to the petitioner, was utterly insufficient to support a finding of negligence against respondent.

A. *Petitioner's claim upon the trial.*

Petitioner's claim upon the trial was comprised of three basic contentions:

1. An explosion occurred as he attempted to remove, with hammer and chisel, a loose nut from *a point on the rear lefthand side of the locomotive which motive* (16, 28, 31, 39, Deft. Ex. C, 198).
he marked with a circle on a photograph of the loco-

2. The locomotive on which the explosion occurred *had just come off the line and had steam up* (15, 48).

3. He had been *ordered* to do this work by Gigli, the machinist whom he assisted (39).

Other testimony, wholly uncontroverted in the record, proved the following facts:

4. The metallic fragments from the object which exploded and pierced petitioner's eye and arm (Deft's Exs. J, K and L, 208) were shown by chemical analysis to be composed of a unique substance known as gilding metal having a content of 95% copper and 5% zinc (146, Deft's Ex. W, 221).

5. There was no copper, brass or bronze fixtures anywhere on the locomotive, except for certain brass nuts up in the cab. Below the running boards, all the fixtures were steel (109, 117).

We may assume, for purposes of argument, that the petitioner's uncorroborated testimony created sufficient evidence to present to the jury factual questions as to (1) whether locomotive 2527 had steam up, or whether it was in dead storage at the time of the accident; (2) whether petitioner had been ordered by Gigli to check the nuts and bolts on the left side of the locomotive, or whether Gigli had told him merely to watch the tools; and (3)

whether the explosion occurred when he was attempting, with a hammer and chisel to remove a loose nut on this locomotive, or when he was hammering a bullet on the front breast-beam of the engine.

However, the conceded fact is that the composition of the metallic fragments found in petitioner's eye and arm was gilding metal with a 95% copper content. It is also undisputed that there were no copper or brass fixtures anywheres on the locomotive except some brass nuts up in the cab; and the petitioner has made no claim that at the time of the explosion he was working in the cab of the locomotive. Accordingly, even if the jury could be permitted to find from the evidence that the explosion in fact occurred when the petitioner was attempting with a hammer and chisel to remove a nut upon the left side of the locomotive, there is no reasonable basis in the evidence for a finding that the explosion came from the engine, or that the explosion was in any way caused by an instrumentality under the respondent's control.

It is of course true, as urged by petitioner (Br. p. 18), that

> "Where an employer requires immature and inexperienced workmen to perform duties in places that are dangerous for such immature and inexperienced persons, the employer may be held liable for injuries received by such employees on account of the character of the premises."

In the instant case, however, there is no basis for a contention that respondent's yard was "dangerous" in character or that the injuries sustained by petitioner were attributable to "the character of the premises." The premises in question were merely the *scene* and not the *cause* of the injuries which he sustained.

It is equally true, as further argued by petitioner (Br. p. 19), that respondent owed petitioner

> "• • • a duty not to impose on him tasks that were beyond his powers and the execution of which involved hazards against which petitioner was not capable of protecting himself."

However, in the instant case, there is no basis for a contention that the task which petitioner claims was assigned to him—"to check the locomotive on the left side to see if there are any nuts or bolts loose" (39)—was "beyond his powers" or involved "hazards against which petitioner was not capable of protecting himself."

Again, in the instant case, there is no basis for a contention that respondent required petitioner to perform a task which it knew or should have known exposed him to "latent dangers." There is not a scintilla of evidence to show that that task to which petitioner claimed to have been assigned—"to check the locomotive on the left side to see if there are any nuts or bolts loose" (39)—involved the slightest element of danger, latent or obvious. Upon the trial petitioner made no attempt whatever to support the groundless allegations of his complaint that respondent negligently "failed to supply the said infant-petitioner with suitable and safe materials and appliances"; that respondent was negligent "in failing to keep the materials and appliances in repair" and in "failing to furnish the infant-plaintiff with a safe and proper location with which to do his work"; that "the engine about which the infant-plaintiff was engaged in discharging his duties, was out of repair, defective and dangerous" and that he was "struck by an object from said engine" (Complaint, Par. Eleventh, 5).

In fact, at the very end of the trial, two short portions of the petitioner's sworn pre-trial deposition were read into evidence. In response to questions, he admitted that when he started hammering on the engine, he did not see any defective part in front of him. He also characterized the place he was working at the time of the accident as "a safe place" to work (177).

We recognize that the rule of this Court in regard to the sufficiency of evidence to present a question of fact as to negligence in actions arising under the Federal Employers' Liability Act, stems from such authorities as *Jones* v. *East Tennessee V. & G. R. Co.*, 128 U. S. 443, and *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554. Succinctly stated, questions of negligence must be submitted to the jury "* * * if evidence might justify a finding either way on those issues". *Wilkerson* v. *McCarthy*, 336 U. S. 53, 55. In other words, if fair-minded men might honestly draw different conclusions from the evidence, the issues must be resolved by the jury. *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 353; *Washington & G. R. Co.* v. *McDade* (*supra*), p. 571-2. The rule was well summarized by a unanimous Court in *Myers* v. *Reading Co.*, 331 U. S. 477, 485:

> "The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict."

Under the terms of this requirement, the Trial Court had "* * * the exacting duty of determining whether there is solid evidence on which a jury's verdict could be fairly based." It was its function "* * * to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff, assuming that the jury took, as it would be entitled to take, a view of the evidence most

favorable to the plaintiff." *Wilkerson* v. *McCarthy* (*supra*), pp. 64-65. [Frankfurter, J., concurring.]

We believe that the evidence so viewed cannot rationally support a verdict for the petitioner based upon a finding of negligence against respondent. Without weighing the credibility of petitioner's testimony, "there can be but one reasonable conclusion as to the verdict" in this case (*Brady* v. *Southern Railway Co.*, 320 U. S. 476, 479). In view of the uncontradicted testimony that the metallic fragments taken from petitioner's eye and arm were gilding metal with a 95% copper content, and that there was no copper whatsoever on the locomotive, with the exception of brass nuts up in the cab, no fair-minded jury could reasonably infer that the petitioner's injuries were caused by an explosion from the engine. The only reasonable inference that may be drawn from the entire record is that the petitioner's injuries were caused by the explosion of a bullet which he hit with hammer and chisel on the front breast-beam of the locomotive.

A unanimous Court of Appeals, after a full review of this record, concluded that the evidence, when viewed in the light most favorable to the petitioner, was utterly insufficient to sustain a recovery for him. That Court assumed, for purposes of argument, that the jury might have found the petitioner's version of the accident to be correct. Yet, a verdict for the petitioner based thereon, would have been without support in law, for the respondent, in the exercise of reasonable care, could not have foreseen any likelihood that such an explosion as described by the petitioner might occur. As the Court succinctly stated:

> "The defendant railroad was not an insurer, and there is nothing whatever in this record to show that it did, or should, have had even the slightest intimation

that hitting the nuts on this engine would cause anything to explode" (233).

The respondent's obligation to the petitioner was not such as to impose liability regardless of due care, and regardless whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of any act, or failure to act, on respondent's part. *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 483; *Wolfe* v. *Henwood*, 162 F. (2d) 998, 1000 (C. C. A. 8), cert. den. 332 U. S. 773. As the Court of Appeals for the Third Circuit recently stated in *Eckenrode* v. *Pennsylvania R. Co.*, 164 F. (2d) 996, 999, aff'd 335 U. S. 329:

> "For a man to be charged with negligence in failing to take precautions there must be some danger towards which these precautions should be directed."

B. *Petitioner's change of theory in this Court.*

On pages 17 and 18 of petitioner's brief, it is asserted that "petitioner's proof" shows eight "facts with regard to respondent's negligence". The first four "facts" require little comment. No. 1: It is true that petitioner was two months short of 17 years of age at the time of the accident and, after completing four years of high school, had only one or two prior jobs (12, 22-23, Deft. Ex. A, 194). No. 2: It is true that a large number of locomotives came each day for repairs at the yards where petitioner worked. No. 3-4: It is true that petitioner had been employed by respondent for a period of nine months, first in the coal pit, next as a locomotive lubricator and then as a machinist-helper for several months prior to the accident (13-14); that he had been furnished with an individual copy of respondent's book of Safety Rules and

required to have a thorough knowledge of them (Deft. Exs. H and I, 204, 205); and that Gigli had instructed him in the use of tools and cautioned him against using them in an improper manner (52, 53, 62). Manifestly, none of the first four "facts", either individually or collectively, involved any element of negligence on the part of respondent.

It is upon the next four "facts", allegedly established by "petitioner's proof", that the present claim of negligence is founded. It is based upon (a) an *incomplete* statement of petitioner's testimony as to items 5 and 6 and (b) a *distortion* of petitioner's testimony as to item 8. Both the incomplete statement and the subsequent distortion are essential to avoid explicit recognition of the precise claim which petitioner actually made upon the trial.

The incomplete statement of petitioner's testimony is the assertion made in items 5 and 6 that "petitioner's proof" showed that "Gigli, on the day of the accident, *ordered him to work alone on a locomotive that required immediate repairs* (39, 41)" and left petitioner alone while he "was engaged in that work". Assuming for the moment that this testimony had not been shown to be false by the documentary evidence, it is important to note exactly what petitioner, upon the trial, actually claimed Gigli had "ordered" him to do. Petitioner's testimony in this connection, regardless of its truth, was emphatic and specific (39):

> "Q. Speak loudly now. A. He said he was going to grind down the chisel and he told me to *check the locomotive on the left side* to see if there are any nuts or bolts loose.
>
> * * * * *

Q. Did he tell you where to start checking the nuts on the locomotive? A. *The middle part of the locomotive.*

Q. *To start in the middle?* A. *Yes.*

Q. What side did he tell you to start on. A. The left side."

The distortion occurs with the assertion under item 8 that "petitioner's proof" showed that "* * * *while he was working on the left front of the engine,* an explosion occurred, causing the injury complained of (16, 32, 33, 34)". *This statement is directly contrary to petitioner's sworn testimony upon the trial. Upon the trial, petitioner swore that the accident occurred as he was attempting to remove a loose nut and bolt from a point near the rear lefthand side of the locomotive which he carefully marked with a circle and two arrows on a photograph of the locomotive* (31, Deft. Ex. C, 198). It was, he swore, the first nut or bolt which he checked (32). At no point in the petition or supporting brief is this exhibit even alluded to.

Petitioner's actual testimony upon the trial was carefully considered and consistent within itself. Confronted with the necessity of proof that he was engaged in the pursuit of his duties at the time of the accident, he first asserted that he had been *ordered* by Gigli to check the nuts and bolts at the middle of the lefthand side of the locomotive. Then to show that *the injuries actually resulted from his execution of this order,* he asserted that the explosion occurred as he was carrying out this alleged order and attempting to remove a loose nut and bolt from the very point on the locomotive he had been told to check.

Upon the trial, it was established by uncontrovertible proof that petitioner's testimony as to the place and manner in which the accident occurred could not be true.

So conclusive was the demonstration that the petition and supporting brief before this Court wholly ignores his sworn testimony that the explosion occurred at the rear lefthand side of the locomotive at the point he marked on the photograph. Instead, it is asserted that "petitioner's proof" showed that he was injured at *"the left front of the engine"*— the very thing that petitioner denied under oath and which respondent itself succeeded in establishing by its own conclusive proof.

Petitioner cannot now repudiate in this Court his own sworn testimony upon the trial and abandon the very theory upon which his entire case was tried. In his complaint he specifically alleged that the locomotive in question "was out of repair, defective and dangerous to persons working on it" (5). Upon the trial he physically marked on a photograph the exact point on the locomotive at which he claimed to have been working when injured (Deft. Ex. C, 198). In his testimony he swore that the explosion occurred as he attempted to remove, with hammer and chisel, a loose bolt or nut from this precise point (16, 28, 31, 39). Even after respondent presented conclusive evidence that petitioner's testimony could not be true, he did not take the stand again to alter or qualify his original testimony in any way. When respondent's motion for a directed verdict was made, it was still petitioner's unequivocal position that his injuries had not, in fact, been sustained as he hit some unidentified object on the breastbeam at the front of the locomotive, but that he had been injured as the result of an explosion which occurred as he was seeking to remove a loose bolt or nut from a point on the rear lefthand side of the locomotive.

Petitioner cannot now contend that the Trial Court should have allowed the jury to infer negligence on the part of the respondent from the fact that an object which

petitioner hit with hammer and chisel on the breast-beam at the front of the locomotive exploded when struck. No such negligence was claimed by petitioner on the trial and any such claim would have been utterly contrary to the contention actually made by him. Petitioner's sworn testimony was that an explosion occurred as he was attempting to remove a loose nut or bolt from the rear left-hand side of the locomotive—not that he hit and exploded a bullet or similar object on the breast-beam at the front of the locomotive. At no time upon the trial did petitioner claim or attempt to prove that anyone had placed or left a bullet or similar explosive on the breast-beam of the locomotive, or that respondent knew or should have known of the existence of such an object. No such question was raised upon the trial and any such contention would have been wholly contrary to petitioner's own sworn testimony. Petitioner cannot disavow the theory upon which he proceeded below and seek reversal of the judgment of the Trial Court on the basis of a wholly new and inconsistent theory advanced for the first time on appeal. *Horne* v. *George H. Hammond Co.*, 71 Fed. 314 (C. C. A. 1), rev'd on other grounds 155 U. S. 393; *Lesser Cotton Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 114 Fed. 133, 142-3 (C. C. A. 8); *Illinois Central R. Co.* v. *Egan*, 203 Fed. 937, 939 (C. C. A. 8); *Van Norden* v. *Chas. R. McCormick Lumber Co.*, 17 F. (2d) 568, 570 (C. C. A. 9), cert. den. 274 U. S. 758; *Baldi* v. *Ambrogi*, 89 F. (2d) 845, 846 (Ct. App. D. C.).

C. *Petitioner's present contention that respondent's explanation of the accident was not "conclusive".*

In petitioner's brief before this Court it is urged (pp. 21-23) that respondent did not *conclusively* prove that the object which petitioner was hammering on the breast-beam

at the front of the locomotive was a *bullet.* No such obligation devolved upon respondent. The question before the Trial Court was not whether respondent had conclusively proved the precise manner in which petitioner's injuries were actually sustained, *but whether there was any evidence to support a verdict based upon petitioner's version of the accident.*

Although not required to do so, respondent went forward and produced uncontroverted evidence, consistent only with the conclusion that the actual cause of petitioner's injuries was a bullet exploded by him with hammer and chisel on the breast-beam of the locomotive. The undisputed evidence is that a "little" object which petitioner was hammering on the front of the engine "went off" (89); that immediately afterwards a dent about 1/8th of an inch deep was found in the steel tank at the rear of another locomotive standing on the same track, immediately in front of the locomotive in question (58, 107-108); that copper colored metallic fragments were found in the dent, on the ground between the two locomotives, and on the breast-beam of the locomotive in question (58, 89-90, 108-109); that the metallic fragments removed from petitioner's eye were of a unique substance known as gilding metal with a 95% copper and a 5% zinc content, the precise metal used for the manufacture of bullet jackets (the copper colored tip encasing the lead core of the projectile) (146, 150, 154-55); that if a small arms cartridge were placed on a locomotive and struck with a hammer and chisel it would explode (157-58); and that if the gilding metal bullet jacket hit and dented the tank of a nearby locomotive it would disintegrate and fragmentize (169).

In urging that the foregoing uncontroverted evidence was not "conclusive", petitioner errs in stating (Br. p. 21)

that "* * * respondent's theory seems to assume that petitioner was hammering on engine 2552—in which a dent was found after the accident * * * whereas the testimony both of petitioner and of Gallo is that petitioner was hammering on Engine 2527". Respondent has never suggested that petitioner was hammering on locomotive 2552. The bullet was hammered on the breast-beam of 2527. As it exploded, it struck and dented the tank at the rear end of locomotive 2552, which stood immediately ahead on the same track. Petitioner similarly errs in stating that "respondent's theory would require the Court to believe that the solid top of a bullet would not only mushroom upon striking an object but would also shatter into fragments." It was not the solid lead core of the bullet which shattered into fragments but the thin *gilding metal bullet jacket* which encased the lead core of the projectile (150, 169; See Deft. Exs. X, Y and Z). Again, in referring to the absence of powder burns, petitioner overlooks the medical testimony that whether or not powder burns would probably result would depend upon the direction in which the shell was pointing when exploded (83). Petitioner's quotation from *American Mfg. Co.* v. *Zulkowski* (185 Fed. 42), in support of his contention as to the "improbability" of so foolhardy an act, is to be contrasted with the earlier assertion in his brief (pp. 17-18) that "petitioner's proof shows * * * [a] youthful propensity for mischief."

POINT II

The Trial Court properly directed a verdict for respondent on the second cause of action.

The petitioner, Ermino Scocozza, father of the petitioner, Anthony Scocozza, sued the respondent to recover the sum of $5,000.00 for loss of services and medical expenses incurred on behalf of his infant son (6).

The Trial Court properly directed a verdict for respondent on this second alleged cause of action, for it is well-settled in this Court that the Federal Employer's Liability Act is comprehensive and exclusive and takes away any common law right of a parent to recover for such medical expenses and loss of services.

In *New York Central & Hudson River R. R. Co.* v. *Tonsellito,* 244 U. S. 360, a decision whose authority has never been questioned, this Court unanimously reversed a judgment for loss of services and medical expenses recovered by a father whose son had recovered a judgment for personal injuries under the Federal Employers' Liability Act. This Court held (pp. 361-2):

> "The Court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions in *New York Central R.R. Co.* v. *Winfield ante,* 147, and *Erie Railroad Co.* v. *Winfield ante,* 170. There we held the act 'is comprehensive and, also, exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. 'It establishes a rule or regula-

tion which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State."

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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